No. 92-1662

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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UNITED STATES OF AMERICA,
*Petitioner,*

v.

RALPH STUART GRANDERSON, JR.,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE RESPONDENT RALPH STUART GRANDERSON, JR.

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE RESPONDENT RALPH STUART GRANDERSON, JR.

### INTEREST OF THE AMICUS CURIAE

The American Bar Association (the "ABA") is a voluntary national organization of the legal profession. With a membership of more than 380,000 individuals from every state and territory, its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.[1]

[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Administration Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Administration Division Council prior to filing.

Since its inception over 100 years ago, the ABA has taken an active interest in improving the administration of criminal justice and, in particular, ensuring both the effectiveness and the fairness of criminal sentencing. Toward these ends, the ABA has promulgated comprehensive sets of standards governing all important facets of the criminal justice system. *See* ABA *Standards for Criminal Justice*. These standards include comprehensive substantive and procedural guidelines concerning sentencing. *See* ABA *Standards Relating to Sentencing Alternatives and Procedures*. Through dissemination of these standards and the work of its Criminal Justice Section and other divisions, the ABA has sought to achieve a criminal justice system that is fair, balanced and constitutionally responsive to the needs of today and the future.

The ABA seeks to appear as *amicus curiae* in this case to voice its conviction that sentencing statutes for probation violation should not be construed to impose prolonged sentences in excess of terms available under sentencing guidelines, absent clear indication of a Congressional purpose to do so. Moreover, because prolonged mandatory minimum sentences have so harmful an impact on the fairness and efficacy of our criminal justice system and because they undermine the vital role of judicial discretion in sentencing, they should not be inferred in cases—like this one—where the terms of the sentencing statute are ambiguous.[2]

## SUMMARY OF ARGUMENT

Section 3565(a) of Title 18 provides that, upon finding that a defendant has violated a condition of probation, the court may continue probation or instead may revoke it and impose any sentence that was originally available for the underlying crime. The statute goes on to state that, "[n]otwithstanding any other provision of this section, when a defendant is found in possession of a controlled substance . . ., the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence."

[2] Copies of letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of the Court.



Five Courts of Appeals, including the Eleventh Circuit below,[3] have agreed that the phrase "original sentence" in this clause refers to the sentence originally available under the Sentencing Guidelines—an interpretation that would typically result in a mandatory required sentence of two months. In arguing for reversal, the Government would have the Court instead interpret "original sentence", as have three Courts of Appeals,[4] to mean the actual term of probation, thus compelling the arbitrary conversion of a term of probation into a prison term of up to twenty months.[5]

The Government claims that its reading of "original sentence" is the only viable one and that Congress intended to strip federal judges of discretion and to require a prolonged prison term dependent on the length of the original probation term in every case where a probationer is found to possess controlled substances. But that harsh

[3] See *United States v. Granderson*, 969 F.2d 980 (11th Cir. 1993); *United States v. Alese*, No. 93-1198, 1993 U.S. App. LEXIS 25110 (2d Cir. Sept. 28, 1993); *United States v. Diaz*, 989 F.2d 391 (10th Cir. 1993); *United States v. Clay*, 982 F.2d 426 (6th Cir. 1992); *United States v. Gordon*, 961 F.2d 426 (3d Cir. 1992).

[4] *See United States v. Sosa*, No. 92-9022, 1993 U.S. App. LEXIS 19953 (5th Cir. Aug. 3, 1993); *United States v. Byrkett*, 961 F.2d 1399 (8th Cir. 1992); *United States v. Corpuz*, 953 F.2d 526 (9th Cir. 1992).

[5] This disparity arises from the extremely limited circumstances in which probation may be imposed under the Sentencing Guidelines. Because probation is primarily available when the maximum term under the Guidelines is six months, the one-third provision, if applied to the originally available sentence, will generally result in a mandatory two-month prison term. Probation terms, in contrast, may run from one to five years for felonies and up to five years for misdemeanors so that the one-third provision, if applied to the period of probation imposed, would often require mandatory terms of up to 1⅔ years (or 20 months).

conclusion is not compelled by the language, structure or history of the provision. The statute is more reasonably read to require a prison term based on the originally available sentence before the imposition of probation, with any additional penalty to be determined at the discretion of the district judge.

1. As a simple matter of statutory construction and common sense, "original sentence" cannot refer to the term of probation imposed because requiring judges to impose one-third of that "sentence" would *shorten* the probation term. That was certainly not Congress's intent. To avoid that conclusion, while still arguing that there is no ambiguity, the Government advocates a tortured reading of the statute in which the verb "sentence" in the first part of the clause necessarily means imposition of a prison term while the noun "sentence" in the second part of the clause necessarily means a term of probation. So awkward a construction is less reasonable than the conclusion by the Court below that "original sentence" refers to the prison term which could have been applied under the Sentencing Guidelines had probation not been imposed.

2. Moreover, nothing in the federal probation scheme anticipates the conversion of a term of probation into a term of imprisonment, and the available terms of probation are consequently not calibrated to the seriousness of the underlying offense for which probation may be imposed (in stark contrast to actual prison terms under the Sentencing Guidelines or to terms of supervised release which are statutorily convertible into prison terms). Transformation of a probationary term into a prison term is inconsistent with the overall structure of the statutory sentencing framework.

3. Nor is the Government assisted by the statute's legislative history. Although the provision was enacted as part of a wide-ranging bill aimed at combatting drug abuse, the few excerpts of the Congressional record relat-



ing to probation revocation indicate only an intention to require at least some term of imprisonment for probationers found to possess drugs. Nothing in the legislative reports or proceedings answers the question whether the mandatory term was meant to be twenty rather than two months, or should be calculated from the full probation term rather than from the original available sentence.

4. Even assuming that the Government's interpretation of the statute is one of two reasonable ones, the language of the provision is inherently ambiguous. Under the rule of lenity, and in light of the widely-recognized distortions in sentencing caused by mandatory minimums, this Court should not infer from equivocal language a prolonged mandatory minimum term in prison for all probationers who possess narcotics, regardless of the other factors on which courts traditionally rely in imposing sentence. Instead, the statute should be interpreted to yield the shorter sentence under well established sentencing principles.

## ARGUMENT

### THE GOVERNMENT'S READING OF THE STATUTE IS NOT SUPPORTED BY ITS LANGUAGE, STRUCTURE OR LEGISLATIVE HISTORY

The Government tries to argue that Section 2565(a) is not ambiguous, and that "the phrase 'original sentence' is susceptible of only one interpretation." Gov't Brief at 29. The Government's analysis of the language, structure and history of the provision only serves to demonstrate that its intended meaning is unclear. The ordinary tools of statutory construction simply do not establish to any reasonable certainty what Congress intended in linking the required prison term to a probationer's "original sentence."

#### A. The Rule of Lenity Must Be Applied to Any Ambiguity in Section 3565(a)

This Court has only recently considered the question of how an ambiguous federal sentencing statute must be construed. In *United States v. RLC*, 112 S. Ct. 1329, 1334 (1992), a majority of the Court held that the Government's proffered interpretation of a sentencing provision in the Juvenile Delinquency Act was only "one possible resolution of statutory ambiguity." A plurality of the Court then found the Government's construction to be contradicted by the statute's legislative history, but added that "if any [ambiguity] did [survive], . . . we would choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *Id.* at 1338.[6]

Three other members of this Court would have ruled that, given the ambiguity of the statutory language, legislative history was irrelevant and "the more lenient interpretation must prevail" under the rule of lenity. *Id.* at

[6] The Court held that the provision of the Juvenile Delinquency Act limiting imprisonment to the maximum term "that would be authorized if the juvenile had been tried as an adult" referred to the maximum sentence under the United States Sentencing Guidelines, not the higher statutory maximum.



1339 (JJ. Scalia, Kennedy and Thomas, concurring). Indeed, the majority in *Crandon v. United States*, 494 U.S. 152, 160 (1990), held that "[i]t is rare that legislative history or statutory policies will support a construction of the statute broader than that clearly warranted by the text."

The rule of lenity is premised on two sound principles. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)); *see also Liparota v. United States*, 471 U.S. 419, 427 (1985). Second, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348. As the plurality in *RLC* noted, the rule is "rooted in 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Id.* at 1338.

The concerns that underlie the rule of lenity are especially implicated in this case and, unless strictly applied, would have far-reaching consequences for the administration of justice. The statutorily-required revocation of probation constitutes a critical stage of the criminal justice process both for the court and for the defendant. It signals a decision by the legislature that the original sentence properly imposed by the district judge must be reconsidered. And for the accused, it may signify the immediate termination of liberty originally granted in the discretion of the sentencing court. Resolving an ambiguity in a probation revocation statute in favor of the harsher sentence would seriously undercut the fairness of the criminal sentencing system by failing to provide notice to the defendant of the consequences of a probation violation.

Moreover, it could entail a mandatory term of imprisonment never intended by the legislature.

Clearly, the rule cannot support an "implausible" interpretation of a statute. *Taylor v. United States*, 110 S. Ct. 2143, 2157 (1990). Likewise, ambiguity does not arise "merely because it was *possible* to articulate a construction more narrow than that urged by the Government." *Moskal v. United States*, 111 S. Ct. 461, 465 (1991) (emphasis in original). But in this case, the Government's construction of the statute is itself implausible. It is "based on no more than a guess as to what Congress intended." *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (quoting *Ladner v. United States*, 358 U.S. 169, 178 (1958)). And that is exactly what the rule of lenity forbids.

### B. The Government's Interpretation Is Not Compelled by The Statutory Language

Section 3565(a), by its terms, is inherently ambiguous. To begin with, whether the phrase "original sentence" means "original *available* sentence of *imprisonment*" or "original *imposed* sentence of *probation*" is not evident from the two words standing alone. The term is not defined, does not appear in the same form elsewhere in the statute, and does not on its face refer back to some other explanatory provision.

Moreover, the interpretation the Government advances runs up against the very statutory language that it cites. If "original sentence" did mean the term of probation, then one-third of that term would be a correspondingly *shorter* period of probation—a nonsensical result. In contrast, if the phrase means the originally available prison sentence under the Sentencing Guidelines, as the court below found, then one-third of the sentence would be a two-month prison term consistent with Congress' stated intention that probation be revoked.



The Government's insistence that the phrase "sentence" must mean the probationary term would also render the statute internally inconsistent. Section 3565(a) provides that the court must revoke probation and "*sentence* the defendant to not less than one-third of the original sentence." As for this initial use of the word "sentence," the Government asserts that there can be no question that it refers to a sentence of *prison*. Within the same clause, therefore, the Government would interpret the verb "sentence" to necessarily signify imposition of a prison term, and twelve words later, interpret the noun "sentence" to necessarily signify imposition of a probationary term. But as this Court has recognized just last Term, where a word is used twice in the same section of a statute, once as a verb and once as a noun, it is "reasonable to give each use a similar construction." *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993) (interpreting word "conduct" similarly as verb and as noun in Section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act).

### C. Differences In the Language and Purposes of the Supervised Release Provisions Imply That Congress Intended Resentencing Schemes Different for Probation Revocation

Comparing the structure of Section 3565(a) with that of Section 3583(g), the provision for termination of supervised release that was enacted as part of the same bill, highlights the ambiguity of the statute. Section 3583(g) expressly mandates, upon termination of supervised release for possession of controlled substances, that the court "require the defendant to serve in prison not less than one-third of the term of supervised release." Not only does this statute specifically refer to the "term of supervised release" in contrast to Section 3565(a)'s use of "original sentence," but it also uses the phrase "require . . . to serve in prison" instead of the more ambiguous "sentence."

The Government's argument that the supervised release provision should be construed *in pari materia* with the probation provision does not eliminate the ambiguity. To begin with, it ignores the difference in language between the two sections. But, equally as important, it overlooks the significant differences between the two types of sentences. A period of supervised release is intended from the date of its imposition to be convertible into a prison term. Thus, upon revocation for any reason, the trial judge may "require the person to serve in prison all or part of the term of supervised release," 18 U.S.C. § 3583(g). Probation is not so convertible. Upon revocation, the judge may "impose any other sentence that was available . . . at the time of the initial sentence," but cannot simply require that the probation term be served in prison.

This critical distinction in the structures of the federal probation and supervised release schemes is underscored by the allowable terms that may be imposed under each. The supervised release statute takes into account the prospect of convertibility and carefully calibrates the available terms of release to the seriousness of the underlying offense.[7] The available terms for probation, in contrast, make no such fine distinctions among the various grades of felony, providing a five-year maximum for all non-infraction offenses with a one-year minimum for felonies. Moreover, the available supervised release terms are lower than the corresponding probation terms for all except the most serious felonies (those allowing a twenty-five year prison term or more), reflecting the difference between a term that may eventually be served in prison and one that may not.

[7] Section 3583(b) provides that the authorized terms of supervised release are "(1) for a Class A or Class B felony, not more than five years; (2) for a Class C or Class D felony, not more than three years; and (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year."



**D. The Statute's Legislative History Does Not Resolve the Ambiguity**

As in *RLC*, "[p]lain-meaning analysis does not . . . provide the Government with a favorable answer," 112 S. Ct. at 1334. Unable to establish that its reading of Section 3565(a) is the only viable one relying on the statutory language alone, the Government next turns to the provision's legislative history. But that exercise offers no enlightenment. Added as part of the Anti-Drug Abuse Act of 1988, the section was plainly part of an effort to impose harsher penalties on persons who possess illegal drugs. But nothing in the Congressional record—and certainly none of the excerpts the Government cites—establishes whether Congress intended the phrase "original sentence" to mean the available sentence under the Guidelines or the probationary term actually imposed. Both a mandatory two-month or a 20-month prison term would increase the punishment facing a probationer who might otherwise have hoped to continue on probation or receive a lighter prison term. The Government's conclusion that Congress must have intended the harsher penalty finds no support in the record.

On the contrary, at least one portion of the section's legislative history reflects Congress' concern with maintaining, not encroaching upon, the court's discretion in sentencing. In analyzing the various provisions of the 1988 bill, the report of the House of Representatives noted that the final version of the sections governing revocation of probation, parole and supervised release had "been modified *to preserve essential elements of judicial or parole commission discretion.*" 134 Cong. Rec. H11108, H11248 (October 21, 1988) (emphasis added). While the modifications at issue apparently did not relate specifically to Section 3565(a), this expression of legislative intent to protect the role of judicial discretion directly undercuts the Government's conclusion that Congress must have meant to impose the harsher mandatory minimum sentence.

As evidenced by the disagreement of the eight Courts of Appeals that have attempted to parse the phrase "original sentence," the statute is nothing if not ambiguous as to how the prison term is to be calculated upon revocation of probation for drug possession. A "reasonable doubt persists about [the] statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal v. United States*, 111 S. Ct. 461, 465 (1990) (citation omitted). And, given that doubt, this Court should "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *RLC*, 112 S. Ct. at 1338.

**E. The Government's Reading of the Statute Creates Unreasonable Results**

The Government's interpretation of Section 3565(a) which it claims is the only "reasonable" one, would also lead to wholly unjust and, in some cases, absurd results. Because possession of most controlled substances is a misdemeanor under federal law, *see* 18 U.S.C. § 844, a defendant who violated a five-year probation term by possessing drugs would face a mandatory minimum sentence higher than that available if he were charged with the actual offense. Moreover, where the probationer's underlying offense was only a misdemeanor, the Government's reading would often require imprisonment for a term longer than the statutory maximum, a prospect of doubtful constitutionality. *Cf. McMillan v. Pennsylvania*, 477 U.S. 799, 88 (1985) (raising possibility that sentencing enhancements not subject to reasonable doubt standard that result in penalties exceeding statutory maximums have due process implications).

In addition, because available probation terms exceed supervised release terms, a probationer found to possess drugs would face a higher mandatory minimum than a defendant on supervised release whose original offense was more serious and warranted imposition of a jail term.



For example, a person who was convicted of the same crime as respondent but who was found to be more culpable could have been given a harsher sentence: the guideline maximum of six months in prison, followed by three years of supervised release. If that more culpable defendant possessed drugs while on supervised release, he would be resentenced to a minimum of one year in prison. 18 U.S.C. §§ 3583(b), (g). Yet, respondent, the less culpable defendant, would, under the Government's reading of the statute, face a minimum of 20 months in prison for the same offense.

Finally, interpreting "original sentence" to mean the probationary term overlooks the *conditions* to which that term may be subject. For example, a court might impose a longer term of probation with few conditions on one defendant while a more culpable defendant might receive a shorter term with more stringent conditions, including one of home or community confinement. Nevertheless, the defendant with the more lenient sentence would face the *harsher* mandatory minimum under the Government's reading, based solely on the length rather than the type of probationary sentence.

These unreasonable disparities would also skew judges' sentencing decisions at the outset. A judge might impose a shorter probationary period than appropriate out of concern that the probation term could be converted into a prolonged prison term. A judge could also sentence a defendant eligible for probation to a short prison term to avoid the possibility that a long term of probation might become a longer prison term. Congress could not have intended these anomalous results.

## CONCLUSION

For the foregoing reasons, the ABA submits that the decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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October 8, 1993